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published in

WELLCHI Working Papers
2008

document version

Peer reviewed version

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citation for published version (APA)

Antokolskaia, M. V., & Coenraad, L. M. (2008). Joint parental responsibilities and compulsory arrangements with regard to children upon divorce. *WELLCHI Working Papers*.

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Published version: no link available

Link VU-DARE: <http://hdl.handle.net/1871/47198>

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Joint Parental Responsibilities and Compulsory Arrangements with Regards of Children upon Divorce

I. A notable trend in family law in the last decennia is the change from sole to joint parental responsibilities after divorce or separation of the parents. Before the beginning of the 1980s automatic continuation of joint parental responsibilities was typical mostly for Eastern Europe, while in the rest of the Europe the normal pattern was attribution of sole parental responsibilities to one of the parents. Nowadays this picture is completely different: joint parental responsibility generally continues after divorce in the great majority of European countries. The development towards automatic continuation of joint parental responsibilities often proceeded in two stages. At the first stage joint parental responsibilities were limited to divorcing parents who both wished such continuation and who made an agreement on execution of parental responsibilities. At present only a few European countries (e.g. Hungary and Switzerland) still require a joint request of the parents or/and a more or less extensive agreement between them (e.g. Austria, Portugal, Slovenia; Serbia). At the second stage joint parental responsibilities continue automatically and their continuation is no longer conditioned upon the request of both parents and/or the reaching of an agreement with regard to the post-divorce execution of parental responsibility. The great majority of European jurisdictions have already reached this stage.¹

II. The growing popularity of joint parental responsibilities after divorce is generally based on three ideas:

- 1) The promoting of formal legal equality of the parents;
- 2) The idea that parents-child relationships as well as parental decision-making with regard to children should not be affected by the dissolution of the marriage;
- 3) The idea that contact with both parents is, in the rule, in the best interests of the child, safe for exceptional cases of child abuse and extreme forms of unsocial behaviour on the part of the parent in question.

The long term experience with application of joint parental responsibilities in Eastern Europe and the experience build up in the last decennia in the rest of Europe, reveal however, a rather disappointing picture. The precise effect of the pan-European legal change from sole to joint parental responsibilities on the wellbeing of children and parents after divorce has yet not been fully studied. However, several weak points can already be indicated.

¹ This development is clearly visible in the comparative overview of the situation in 22 European jurisdictions published in 2004 by the Commission on European Family Law in 2004. See: <http://www2.law.uu.nl/priv/cefl/> > working field two> *Parental Responsibility* and K. Boele-Woelki, *Parental responsibilities - CEFL's Initial Results*, in: Boele-Woelki (Ed.), *Common Core and Better Law in European Family Law*, Antwerpen - Oxford: Intersentia, 2005, p. 148-149.

Ad. 1. Equality of parents

As soon as joint parental responsibilities become the general rule (e.g. 100% of divorce cases in Russia the last 80 years; more than 90% of cases in the Netherlands since 1997) it becomes clear that joint parental responsibilities give the parent, who does not reside with the child (mostly the father) very equal rights on paper but very little rights in reality. The parent residing with the child can effectively frustrate the execution of the other parent's right, including his right to keep contact with the child. The holding of parental responsibilities then becomes a mere honourable title, and the real issue of the division of power between the parents shifts to the issue of child residence. This development has led to much disappointment in joint parental responsibilities on the part of not residing fathers, and the establishment of organisations committed to 'fathers' rights' all over Europe.

Ad. 3. Continuation of pre-divorce parent-child relations and parental decision-making with regard to children

Automatic continuation of joint parental responsibilities after divorce irrespective of the wishes of the parents and their ability to communicate with one another means that also parents who are no longer on speaking terms with one another, find themselves nonetheless charged with joint parental responsibilities. As such parents are unable to agree on issues like child residence, maintenance, visitation and other matters, they will have to resort to the court. In such cases the continuation of the pattern of informal amicable parental decision-making that existed before the dissolution of the marriage, is an illusion.

Ad. 3. Contact with both parents in the interest of the child

This argument is often put forward by 'fathers' rights' organisations. Recent sociological research² reveals that much contact with the not residing parent at the expense of much stress resulting from parental conflict, is more detrimental for the child than little or no contact and no stress. Joint parental responsibilities after divorce generally lead to more conflict among parents. This because the competence to decide on child-related issues, others than daily issues, belongs to both parents, holding joint parental responsibility. Therefore they will have to communicate and agree with each other more often than in case of sole parental responsibilities. The failure to do so this leads to continuous conflict and even law suits.

III. The proposed Dutch legislative response: not a good example to follow.

The countries still conditioning the continuation of joint parental responsibilities upon a joint parental request and/or an agreement between the parents on the execution of parental responsibilities, still manage to exclude parents who are unable to communicate with one another. For the countries that already provide for the automatic continuation of joint parental

² E., Spruijt, E., et.al, *Het verdeelde kind. Literatuuronderzoek omgang na scheiding*, 2002, Utrecht: New Impulse.

responsibilities, a (re)-introduction of such requirements would mean a step back. This can explain why some of these countries are looking for other ways of combating the emerged shortcomings of continuation of joint parental responsibilities. As the problems with joint parental responsibilities are more or less the same all over Europe, it is interesting to see which solutions are effective and which are not. From this point of view the proposals discussed at the moment in the Netherlands provide a good negative example. The Dutch Parliament has recently been dealing and is still dealing with legislative proposals seeking to solve these problems by obliging divorcing parents to make a so-called 'parental plan', that is a more or less comprehensive agreement on how they are going to take care of the children after divorce.³ Such agreement is, however, not to be a pre-condition for the continuation of joint parental responsibilities, but, oddly enough, a pre-condition for filing a joint or unilateral divorce petition before the court. The essence of the compulsory parental plan is that the parents should agree beforehand upon the most important issues related to the child: residence, maintenance, exchange of information and the way of execution of parental responsibilities. The parental plan is supposed to be a remedy against future conflicts. The Dutch academic community is, however, almost unanimous in its anxiety that this solution will not achieve its goals.

The weakest point of the proposal is the requirement of a parental plan in case of an unilateral divorce. Such requirement would be completely unique in Europe. Although 10 out of the 22 European jurisdictions covered by the CEFL National Reports require an agreement with regard to children for a divorce by mutual application, not one jurisdiction extends this requirement to unilateral divorce.⁴ This seems only logical, as divorce upon unilateral request is mostly an indication of non-agreement between the spouses on the issue of the divorce, and there seems to be little chance that they would nonetheless manage to agree on the required parental plan. As article 6 EVHR requires that the access to the court may not be obstructed, the Dutch proposals provides that, when the parties 'cannot be reasonably expected' to produce a parental plan within 'reasonable time', the divorce petition can be accepted without such plan.

The second weak point of a compulsory parental plan is that it also does not work in the most ideal case of joint parental responsibilities: the situation where divorce did not affect the ability of the parents to take decisions with regard to the children. The obligation to make a parental plan will urge such parents to unnecessary squeeze in their relationships into the Procrustean bed of binding legal arrangements.

A parental plan could possibly only work well for a category in-between of the two afore mentioned groups, but in such situation parents would be better positively encouraged, rather than forced, to agree on arrangements on how to care of their children after divorce.

³ Two bills were recently introduced into the Dutch Parliament. The first one: *Act on Dissolution of Marriage without Judicial Interference and Regulation Continuation of Parentage after Divorce* was presented by a MP in 2004, also tried to introduce administrative divorce in the Netherlands. It managed to pass the Second Chamber 2005, but perished in the First Chamber in June 2006. The second Bill of the *Act On Promoting Continuation of Parentage after Divorce and Responsible Divorce* was introduced by the former Government and is at the moment under discussion in the Second Chamber.

⁴ See: <http://www2.law.uu.nl/priv/cefl/> > working field one> Grounds of Divorce and Maintenance Between Former Spouses.

For the other European countries, the compulsory parental plan as presently proposed in the Netherlands seems not to be an example to follow.

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